1738. *November* 10. POLLOCK *against* STORIE.

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Irritancy *in pacto legis commissoriæ in pignore* becomes effectual by the lapse of 40 years.

WHERE lands were disponed in security of money lent, under reversion, but with an irritancy, that, in case of not redemption at the time limited, the lands should irredeemably remain with the disponee; it was found, "That the reverser not having offered to redeem since the term, when, by paction, the right of redemption was to become void, which is more than 40 years ago, (it was Whitsunday 1695,) and that the disponee and his father had possessed since the year 1705, the right was now irredeemable."

This was by the narrowest majority; the point just turned upon this, Whether the paction was void till declarator; or, if the paction was *stricto jure* valid, and only a remedy competent against it *ex equitate*, which was barred by the lapse of 40 years?

Fol. Dic. v. 3. *p.* 337. *Kilkerran*, (IRRITANCY.) *No.* 1. *p.* 297.

*** C. Home reports the same case:

IN September 1688, Archibald Anderson, burgess in Paisley, granted a bond for 250 merks, to John Park, which he obliged himself to pay (with interest from Martinmas then next) to him at Martinmas 1695; and, for his better security, he disponed to Park a house and yard, &c. in the burgh of Paisley, and which contained this clause of reversion, That, in case the said Archibald Anderson should make payment of the principal sum, &c. at the term above specified, then, and in that case, the house &c. was declared to be redeemable from Park and his foresaids, without necessity of a declarator; but in case he and his foresaids should fail in the payment of the said sums at the term of Martinmas 1695, then the house, &c. is declared to be irredeemable from Park in all time thereafter.

Upon this disposition he took infeftment that year; and, in the 1694, he disponed the subject to John Storrie, who was also infeft; however, it would seem that Storrie did not obtain possession of the subjects disponed for upwards of ten years after the irritancy of the reversion was incurred; for, by a decreet of removing obtained by him against Archibald Anderson before the Bailies of Paisley, *anno* 1705, it appeared that Anderson was decerned to remove, to which he gave obedience by quitting the possession to John Storrie, who, and his son George, continued to possess the same for more than 40 years after Martinmas 1695, when, by paction, the reversion was to become void.

Robert Pollock having obtained a right to these subjects from the heirs of Archibald Anderson, brought a process of mails and duties thereon.

Pleaded for George Storrie; That his sasine, as heir to his father, was dated in the year 1725; from which it was plain he had the benefit of a possessory judgment, even by more than seven years possession, on his own infeftment;

and that the process of mails and duties was a little too summary after the lapse of so many years, as it required at least a reduction or declarator of redemption to proceed, before the right acquired by the pursuer could be effectual for a possessory action. 2*do*, By the rights produced, it appeared the pursuer's authors were long ago denuded; and, though that was under reversion, from seven years, ending at Martinmas 1695, and whereof the irritancy being incurred, yet the disponer might be entitled to be reponed against the lapse of the time; but, having made no application for such remedy, in any shape whatever, till more than 40 years were elapsed after the conventional irritancy was incurred; that any relief or claim to be reponed, was now cut off by the negative prescription.

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It was *answered* for the pursuer; That the real right was granted for security of the sum lent; so that it was plain, if Park or his assignees had possessed the tenement for a thousand years, he was still possessing only as a creditor for payment of his principal sum and annualrents that became due yearly, by the express stipulation of parties, even after the expiry of the limited reversion; and it was never heard that a creditor could plead the benefit of a possessory judgment, that privilege being only competent to proprietors or tacksmen of land; and the benefit of it is, that the possessor must continue in the same state till his right is reduced: But as to a creditor, his possession must impute in payment of his debt; and, whenever that is done, his right evanishes, and he must yield the possession. Indeed, if a declarator of irritancy had proceeded, the defender would have thereafter possessed as heritor, and thereby gained the irredeemable right of property, whereby he would have been entitled to the possessory judgment; but, while he possessed as creditor for security of his debt, it is absurd to pretend he could thereby gain that privilege, more than he could the irredeemable right of property upon the positive prescription; for both must go hand in hand; and, where the one does not take place, it is impossible that the other can. Surely he could not acquire an irredeemable right of property by the positive prescription, as it would have been contrary to the very title of his possession; of course, the possessory judgment cannot defend him.

2*dly*, As to the defence, with respect to the negative prescription, it was *answered*, That the defender might have thereby lost his right; but it was not tenable to plead, the pursuer, who is proprietor, could lose his property in that manner, especially as there is a great deal more here than an incorporate reversion, the very title of the right being a security for payment of principal sums and annualrents; so that, without the aid of the statute 1617, the creditor's right would evanish whenever his debt was paid, and the reverser's right become disincumbered; therefore the question here is, Whether the proprietor can lose his right of property through not payment of a debt secured thereon for the space of 40 years? the very stating of which is absurd. Neither can it vary the argument, that the reversion was limited, and 40 years run since the

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expiry of the term for redeeming, seeing it was competent, at any time before declarator, to offer payment of the sums resting: And, if these were paid before declarator, (which is the case here,) by the creditor's possession, no declarator could ever be obtained, or was competent.

In short, this paction is reprobated as much by our law as it was by the civil, with this variation only, that we, to bring matters to a certainty, whether the wadsetter or reverser shall have the property, allow the latter to redeem, by payment at any time before decreet; and, in case the wadsetter shall obtain a declarator, voiding the reversion, then he becomes proprietor; but this is the effect of the judgment of Court, and the presumed acquiescence of the reverser, by not offering payment before decreet is obtained. This being the case, it cannot be denied it is *meræ facultatis*, and purely in the debtor's option to pay any time before the declarator is extracted against him: Our law has allowed him to be silent, till he is quickened by such process, and then, or never, he must take care to save his property.

Replied for the defender; Though no declarator for not redemption was ever obtained by the disponee or his successor, there appears plainly to have been the equivalent to that, by the process and decreet of removing in the year 1705, obtained against the very person who was entitled to the reversion, or to be reponed against the lapse of time, and to plead that the same was still redeemable, and offer the money in order to avoid being removed by the then pursuer as heritable proprietor of the subject, who, by that process, did, in as strong terms, assert his right to the same, as if he had libelled a declarator of irritancy; since a removing is certainly a stronger exercise of a right of property than a process of mails and duties: And, as it must be allowed that a declarator would have foreclosed all future claims to the reversion, it likewise proves, that the *pacta legis commissoriæ etiam in pignoribus*, are not absolutely reprobated by our law, otherwise it could be no foundation of a declarator in order to foreclose any after redemption. In the *next* place, with respect to the argument, That the lapse of 40 years, since Martinmas 1695, is sufficient to cut off the pursuer from any claim for relief, it was observed, That the irritancy is not *ipso jure* void, but only purgeable *ex æquitate* before declarator; and, if the omission to purge before the extract of a decreet would for ever foreclose the disponer from being reponed to the reversion, which was once forfeited by the terms of the clause itself, upon the lapse of the time limited for it; the defender apprehends, that much more must that equitable claim of relief be cut off by the long prescription of 40 years, which is a much greater negligence on the part of the disponer, and, by the general principles of law, serves to cut off all obligations and actions whatsoever; and therefore seems fully to supply the want of a declarator in favour of a disponee: Besides, this remedy or relief the Court is in use to grant *ex æquitate*, can never be stronger than any other perfect right which may be the ground of an action of reduction; and yet all these are cut off by the lapse of time.

As to the negative prescription on the statute 1617, it is true, the same bears an exception of reversions *in gremio*, or registered apart; but that can afford no objection, seeing the act is plainly to be understood of perpetual reversions, which being taken as *meræ facultatis*, are excepted from the prescriptions in these two cases: But this cannot be applied to a reversion limited to a certain time, which, though it be *in gremio, juris*, yet, upon the face of the right, it cannot appear otherwise than as it is expressed, that is, temporary, and, *ipso jure*, perishing by the lapse of time, though, *ex officio judicis*, the reverser may be reponed; but this title to be reponed is then the only reversion that remains, and, like all other actions or reversions, must be subject to a negative prescription.

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Duplied for the pursuer; The decreet of removing can never supply the want of a declarator, since neither the nature of the action, nor the inferior judge before whom it was carried on, was competent for that purpose; more especially, as it might have been intented immediately after the date of the right; which demonstrates, that it could stand in no stead of a declarator of irritancy of the reversion. It is true, the reverser might have taken that opportunity of paying the money, but his circumstances were then such as he could not procure it, and therefore behoved to submit to a removing; but that could not exclude him from paying at any time thereafter, and claiming his right before declarator was obtained.

THE LORDS found, That in respect the reverser or his successors have not offered to redeem since the term of Martinmas 1695, when, by paction, the right of reversion was to become void, which is now more than 40 years ago; and that the defender and his father have possessed the lands without quarrel ever since the 1705, the right is now irredeemable.

C. Home, No 102. *p.* 160.

1749. *July* 21. KERSCALLAN *against* BROWN.

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WHERE a disposition had been made in 1699, of a piece of ground, in consideration of L. 700 Scots paid, with a clause of reversion, 'That in case the 'granter should, on Martinmas-even 1704, pay or consign, in manner therein 'mentioned, the said sum of L. 700, the disponee should renounce his right to 'the said lands; but if it should happen that the disponer should fail to redeem, 'as aforesaid, the lands should remain with the disponee for ever,' but without any clause of requisition; on which disposition the disponee had possessed for upwards of 40 years, who nevertheless could not plead prescription in respect of the minority of the heirs of the disponer: In an action at the instance of the person now heir to the disponer, to have it found and declared, that it is still competent to him to redeem, the LORD ORDINARY, "in respect that, at the date of the wadset, the rent of the lands wadsetted was no more than equal to the